No. 17-130

In the Supreme Court of the United States

RAYMOND J. LUCIA,
and RAYMOND J. LUCIA COMPANIES, INC.,
Petitioners,

–v–

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES IN SUPPORT OF NEITHER PARTY

GERALD MARVIN BOBER
COUNSEL OF RECORD FOR AMICUS CURIAE
THE FORUM OF UNITED STATES
ADMINISTATIVE LAW JUDGES
P.O. BOX 14076
WASHINGTON, D.C. 20044-4076
(410) 833-6303
MBOBER@FORUMALJ.ORG

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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Continental Congress 1774-1789, at 626 (Gaillard Hunt ed., 1914). And the Minutes from a February 1778 session of the Continental Congress described continental-level civil and military officers as "officer[s] of the United States." Minutes of Feb. 9, 1778, *in* 10 *Journals of the Continental Congress*, *supra*, at 138-40 (Worthington Chauncey Ford ed., 1908); *see also generally Officers*, *supra*, at 475-79 (providing more in-depth explanation of evidence from the *Journals of the Continental Congress* and Series I of the Readex Early American Newspapers database containing 340,000 newspaper issues from 1690 to 1876).

In addition, on a number of occasions the Founders used a variety of distinct phrases to describe Article II officers—suggesting that the descriptor "Officers of the United States" was not considered a precise term of art. *See Officers*, *supra*, at 474. For example, Alexander Hamilton in Federalist No. 77 discussed removal and appointment procedures for "officers of the government," the Anti-Federalist essayist writing as "The Federal Farmer" described Article II officers as "officers of the union," and Representative Roger Sherman used the phrases "officers of the United States" and "officers of the Federal Government" interchangeably during a 1790 congressional debate on militia legislation. *See* The Federalist No. 77, at 396; The Federal Farmer, Anti-Federalist No. 76-77: An Anti-Federalist View of the Appointing Power Under the Constitution (1788), *in The Anti-Federalist Papers*, *supra*, at 293, 294 (Bill Bailey ed., n.d.), https://perma.cc/XM7Q-XV4B; 14 *Documentary History of the First Federal Congress of the United States of America, 4 March 1789-3 March 1791*, at 120-21 (William Charles diGiacomantonio et al. eds., 1995).

Also, examination of every use of the phrase "officers of the United States" in the drafting and ratification debates, the Federalist Papers, and the Borden collection of Anti-Federalist essays revealed no direct definition of the precise scope of the phrase. *See Officers*, *supra*, at 468 & n.131, 474-75. *But see id.* at 475 & n.164 (noting one contradictory use of the phrase during the first congressional debates). This may be because the term "officer" had a "common and known acceptation" at the time. *See* 4 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 454-55 (Jonathan Elliot ed., Washington, Jonathan Elliot 2d ed. 1836) (hereinafter *Elliot's Debates*) (recording an 1806 congressional debate statement); *see also* 8 *Annals of Cong.* 2294, 2306 (1799) (recording Rep. Harper's reference to the "universally received signification of the term 'office'").

C. Founding-era dictionaries and commentaries

Because the phrase "Officers of the United States" is not a term of art for especially important officials, it makes sense to turn to the late eighteenth century meaning of the standalone term "officer" to determine the scope of federal officials under the Appointments Clause.

The majority of the ten Founding-era dictionaries that *amicus* surveyed defined a civil "officer" to be a "man employed by the public(k)" and described an "office" as a "public employment" or a "public charge." *See, e.g.*, 2 Samuel Johnson, *A Dictionary of the English Language* (London, J.F. & C. Rivington 6th ed. 1785) ("Officer": "1. A man employed by the publick"; "2. A commander in the army;" "3. One who has the power

of apprehending criminals, or man accountable to the law"); *see also Officers*, *supra*, at 486-88 (cataloguing the dictionary definitions). The only one of the ten Founding-era dictionaries with a materially different definition explained that the word "officer" "in general signifies any person that has a peculiar post or business appointed him." *See* Thomas Dyche & William Pardon, *A New General English Dictionary* (London, Toplis & Bunney 18th ed. 1781); *Officers*, *supra*, at 486 & n.226. Chief Justice Marshall recounted a similar definition several decades later in an 1823 circuit court opinion, explaining: "An office is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States." *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747); *see also* Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828) ("officer": a "person commissioned or authorized to perform any public duty").

The ordinary-language dictionary definitions and Chief Justice Marshall's explanation are consistent with eighteenth century legal dictionary definitions of "officer," which similarly incorporate the concept of a public charge or duty. *See Officers*, *supra*, at 488-90. For example, Matthew Bacon states that "the Word Officium principally implies a Duty, and ... the Charge of such Duty." 3 Matthew Bacon, *A New Abridgment of the Law* *718-19 (London, C. Bathurst 4th ed. 1778). He then observes that officer status is not dependent on the significance or level of importance of one's duty: An officer "is not the less a Public Officer, where his Authority is confined to narrow Limits; because it is the Duty of his Office, and the Nature of that Duty,

which makes him a Public Officer, and not the Extent of his Authority." *Id.* at *719. Further underscoring that one's eighteenth century status as an "officer" was unrelated to discretion or final decisionmaking, Bacon also describes a class of "Ministerial Offices." *See id.* This group included positions like the "Office of Register of Policies of Assurance," which "required only the Skill of Writing after a Copy," and recordkeepers like chirographers who kept records of court-imposed fines. *See id.* at *734; Dyche & Pardon, *supra* (defining "Chirographer").

The bestselling eighteenth century dictionary by Nathan Bailey used the words "officer(s)" and "office(s)" more than 500 times to define other terms. *See Officers, supra*, at 485 (discussing the "officer" and "office" references); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 361, 367-81 (2014) (discussing Bailey's dictionary). Treating Bailey's dictionary as a self-contained corpus, *amicus* examined the context of each of those references. *See Officers, supra*, at 485. The dictionary characterized as "officers" numerous assistants, recordkeepers, and other public officials engaged in menial tasks. *See id.* at 490; *see generally* N. Bailey, *An Universal Etymological English Dictionary* (London, J. Murray 25th ed. 1783).

For example, "Messengers [of the Exchequer]" were "officers belonging to that Court, who attend the Lord Treasurer, and carry his letters and orders." Bailey, *supra*, (*Messengers*). A sword-bearer was "an officer who carries the sword of state before a magistrate." *See id.* (*Sword*). Satellites were "Life-Guards, or Officers attending upon a Prince." *Id.* (*Satellites*). A "Swabber" was

"an inferior officer on board a ship of war, whose office it is to take care that the ship be kept clean." *Id.* (*Swabber*). A "sewer" was "an officer who comes in before the meat for a King or Nobleman, and places it upon the table." *Id.* (*Sewer*). A "Gauger" was "an officer employed in gaging," or measuring the contents of a vessel. *Id.* (*Gager/Gauger*; *Gage/Gauge*). A Chafe-Wax was "an Officer belonging to the Lord Chancellor, who fits the wax for [the] sealing of writs." *Id.* (*Chafe*). An "Assay-Master" was "an officer of the Mint, who weighs the bullion, and takes care that it be according to the national standard." *Id.* (*Assay*). And a butler was "an officer that provides the king's wines." *Id.* (*Botiler/Butler*). *See also Officers*, *supra*, at 490-94 (detailing a lengthier list).

The dictionary's characterization of these officials as "officers" would have influenced the late eighteenth century American understanding of the term even though the new constitutional system embraced few of these specific positions. *See Officers*, *supra*, at 492. *But see* Act of Aug. 4, 1790, ch. 5, § 6, 1 Stat. 145, 154 (1790) (repealed 1799) (providing for gaugers); Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246, 246 (1792) (providing for an Assayer). The Framers intentionally rejected the British approach for creating offices and appointing officers, but no evidence suggests the Constitution imported an altered meaning of the word "officer" itself. *See Officers*, *supra*, at 493-94. One complaint underlying the colonists' war for independence was that the King had "erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people." *The Declaration of Independence* para. 12 (U.S. 1776). Under British practice the King had power to both create and fill public offices. *See* The Federalist No. 69, at 360-61 (A. Hamilton); *Officers*, *supra*, at 492-

93 (further describing British practice). The Framers rejected this potential for abuse, cleanly separating the power to create offices from the power to appoint officers to fill them. *See* Mascott, *Constitutionally Conforming Agency Adjudication*, *supra*, at 28; Volokh, *supra*, at 769. The Court should not acquiesce in resisting this safeguard by ratifying the lower courts' expansive creation of a non-officer "employee" class free from separation-of-powers limits that preserve accountable and transparent governance.

D. Contextual uses of "Officer" and "Officers of the United States" in Founding-era sources debating the Constitution

The Federalist Papers, the Borden collection of Anti-Federalist essays, and the drafting debates contain hundreds of references to the terms "officer(s)" and "office(s)." *See Officers*, *supra*, at 468 n.131. Examining their context, as well as every reference to "Officers of the United States" in the ratification debates, strongly suggests that "officer" had a very broad scope in the late eighteenth century. *See Officers*, *supra*, at 494-504 (detailing this analysis and explaining any potential counter-examples). The Framers and ratifiers believed that thousands of officials would qualify as "officers." In fact, their statements do not appear to account for any class of ongoing non-officer positions other than a class of "servants" and "attendants." *See Officers*, *supra*, at 450, 503; *see also, e.g.*, Federal Farmer XVIII, *supra*, *in The Anti-Federalist Papers*, *supra*, at 162 (referring to the parties who would work in the capital city as the federal government's "own members, officers, and servants").

Following are several illustrative examples. During the North Carolina ratification debate, Mr. Maclaine described "inferior officers of the United States" as "petty officers" who maintained "trifling" duties. 4 *Elliot's Debates*, *supra*, at 43-44; *see also Officers*, *supra*, at 496-97. Mr. Taylor observed that if the Constitution were adopted, "we shall have a large number of officers in North Carolina under the appointment of Congress" because, for example, there would be "a great number of tax-gatherers." *See* 4 *Elliot's Debates*, *supra*, at 36. During the drafting debates, Gouverneur Morris observed that the executive would have the duty to appoint "ministeral officers of the administration of public affairs." 2 *Farrand's Records*, *supra*, at 52. Later in the drafting process, James Wilson observed that the appointing power would encompass even "tide-waiter[s]," a position that Samuel Johnson's dictionary described as an "officer who watches the landing of goods at the customhouse." *See* Johnson, *supra* (*Tidewaiter*).

The Anti-Federalist essayist known as the "Federal Farmer" expressed concern that federal taxation powers would lead to "many thousand officers solely created by, and dependent upon the union." The Federal Farmer, Anti-Federalist No. 41-43 (Part I): The Quantity of Power the Union Must Possess Is One Thing; The Mode of Exercising the Powers Given is Quite a Different Consideration (1788), *in The Anti-Federalist Papers*, *supra*, at 148, 149. James Madison disagreed and believed the federal government would have relatively few officers. *See Officers*, *supra*, at 501-02 (discussing these various positions). But this is because Madison believed that the federal government's "few and defined" powers would require it to have only one officer for every "thirty or forty, or even more, officers" in

the states, which had "numerous and indefinite" powers. The Federalist No. 45, at 241. In particular, Madison concluded that state officers would exceed federal officers "beyond all proportion, both in number and influence," *see id.* at 240, because he believed that state officers would collect taxes on behalf of the federal government if it ever imposed a federal internal revenue tax, *see id.* at 241.

Madison clearly believed, however, that the term "officer" itself had a broad scope, embracing many officials. *See Officers*, *supra*, at 502. In describing state and local officers, he referred to "the justices of peace, officers of militia, ministerial officers of justice, with all the county, corporation, and town officers ... having particular acquaintance with every class and circle of people." *See* The Federalist No. 45, at 240. Tellingly, despite the strong disagreements between Federalists and Anti-Federalists over whether the Constitution permitted too strong a concentration of centralized power, writers on both sides shared the same understanding of the broad meaning of the term "officer."

This understanding of "officer" also extended back to the time of the Continental Congress. *See generally Officers*, *supra*, at 537-45. For example, a 1778 resolution regarding military hospitals characterized "apothecaries, mates, stewards, [and] matrons" as "officers." *See* Minutes of Feb. 6, 1778, *in* 10 *Journals of the Continental Congress*, *supra*, at 127, 130 (Worthington Chauncey Ford ed., 1908). These individuals had nondiscretionary duties far below the level that contemporary courts have considered mandatory for "officer" status. A 1775 Continental Congress committee report indicated that the role of mates and apothecaries was to "visit and attend

the sick." *See* Minutes of July 27, 1775, *in* 2 *Journals of the Continental Congress*, *supra*, at 210. The 1775 report also characterized clerks and storekeepers as "officers," observing that storekeepers were "[t]o receive and deliver the bedding and other necessaries by order of the [hospital] director" and clerks were "[t]o keep accounts for the director and store keepers." *See id.* at 210-11 (discussing "the choice of officers"). *But see Officers*, *supra*, at 539-40, 542 & nn.589, 599 (explaining that the actual appointment methods used to fill a number of these positions appeared to be in some tension with the description of them as "office[s]").

Several Continental Congress-Era handwritten lists of "officers" on file at the National Archives also suggest that officials with relatively insignificant responsibilities were considered officers at that time. *See Officers*, *supra*, at 540-41. A 1783 document titled "A List of the Officers" listed positions as low-level as clerk and clerk/interpreter. *See* A List of the Officers in the Department of Foreign Affairs and Their Appointments (1783), *microformed on* Microcopy No. 247, Roll 22 (Nat'l Archives & Records Serv.). A 1775-76 document titled "Officers appointed" listed an engineer, a storekeeper, and a surgeon along with colonels, majors, and brigadier generals. *See* Officers Appointed (n.d.), *microformed on* Microcopy No. 247, Roll 195, Item No. 178 (Nat'l Archives & Records Serv.). The reference to just "officers" in the titles of these two records appears deliberate as several other archives records instead used the label "officers & c." when listing lower-level non-officers like messengers. *See Officers*, *supra*, at 540-41; *see also id.* at 513-15 (explaining that Founding-era messengers and office-keepers likely were not considered "officers" because their responsibilities did not include any governmental tasks imposed by law).

E. Early appointment practices

Early appointment practices during the First Congress confirm the understanding of Article II "officers" as officials responsible for an ongoing statutory duty. The only categories of civil executive officials in ongoing positions cleanly excluded from Article II appointment practices were "(i) positions more like those of 'servants' or 'attendants' and (ii) 'deputies' acting as agents in place of an officer, where the officer was subject to personal legal liability for the deputy's actions."[3] *Officers*, *supra*, at 450.

Clerks maintaining legislatively required records were appointed by department heads in conformity with Article II. *See, e.g.*, Act of Sept. 11, 1789, § 2, 1 Stat. 67, 68 (authorizing the heads of the three executive departments to appoint clerks); *see also Officers*, *supra*, at 508, 511-15. Officials as varied as internal revenue inspectors and supervisors, lighthouse keepers and superintendents, ship masters and first, second, and third mates on revenue cutters (although not "mariners" and "boys"), customs collectors, naval officers, and surveyors also were selected in compliance with the Appointments Clause. *See Officers*, *supra*, at 507-37 (further discussing the First Congress's appointment practices). *But see id.* (noting possible counter-examples like certain officials in

3. These deputy marshals, collectors, surveyors, and naval officers constituted a relatively small category who carried out the duties of their primary officer as his representative. Consequently, they were not considered officers in their own right. *See id.* at 509, 515-20. Other early-level positions bearing the moniker "deputy" were appointed in compliance with Article II where they did not have the same agent-principal liability relationship with a higher-level officer. *See id.* at 520-22 (discussing, among other positions, deputy apothecary generals charged with safekeeping medical equipment and deputy postmasters).

the Territories, *id.* at 528 n.508, and the National Bank, *id.* at 531). Contrary to the suggestion of some modern judicial opinions that Congress can determine "officer" status based on whether it chooses to directly tie statutory duties to a particular official, *see, e.g.*, *Landry*, 204 F.3d at 1133, the original meaning of "officer" encompassed every official who happened to carry out a statutory task—whether Congress had explicitly assigned it to them or not. For example, clerks who kept statutory records were considered "officers" even where statutes just generally required executive recordkeeping without assigning clerks to the job. *See Officers*, *supra*, at 507-08, 513-15. Analogously, today if Congress were to authorize an agency to promulgate rules, every official participating in that task would be an "officer" under the statutory duty standard.

In contrast, messengers and office-keepers did not carry out legislative tasks authorized or required by Congress, so they were not "officers" and Congress consequently did not need to establish their positions "by Law." *See* U.S. Const. art. II, § 2 (requiring that Congress establish the appointments for officers "by Law"). Individuals in these positions served more as assistants and carried out nonstatutorily required tasks like "arranging and preserving the newspapers, and the printed copies of the laws and documents of Congress," as well as "putting up and packing despatches and other papers for transmission by mail." *See* Louis McLane, The Following Arrangement of the Gentlemen Employed, the Distribution of Their Duties, and Rules for Their Performance, Are Directed to be Observed in the Department of State, from and After the 30th June, 1833 (1833), *microformed on* M800, Roll 1, Vol. 1A (Nat'l Archives & Records Serv.).

In apparent contrast to the clerk/messenger dividing line, one set of positions that at least initially did not conform with the statutory-duty "officer" construct is lower-level customs officials like weighers, measurers, gaugers, and inspectors. *See Officers*, *supra*, at 523-27. Numerous Founding-era writings described them as "officers," but they were not selected in compliance with the Appointments Clause in 1789. They were instead subject to hiring by customs collectors who did not head a department. *Compare, e.g.*, Letter from Nathaniel Smith to George Washington (July 10, 1789), *in* 3 The Papers of George Washington 176 (Dorothy Twohig ed., 1989) (requesting to be considered for the "office" of gauger), and Notes on the Collection Bill (HR-11) (n.d.), *in* 16 *Documentary History of the First Federal Congress, 4 March 1789-3 March 1791*, at 1052 (Charlene Bangs Bickford et al. eds., 2004) (describing an inspector as an "officer" in notes on draft legislation), *with* Act of July 31, 1789, ch. 5, § 5, 1 Stat. 29, 36-37 (repealed 1790) (authorizing appointment by collectors); *see also Officers*, *supra*, at 523-27. But Congress addressed this situation in 1799, requiring the "approbation" of the Secretary of the Treasury for the appointment of these customs officials. *See* Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642 (amended 1811). And, an Attorney General opinion issued in 1843 concluded that customs inspectors are Article II officers, observing that any statute permitting customs collectors to appoint inspectors would be "null and void under the constitution." *See* Appointment & Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164-65 (1843).

Measurers, gaugers, and weighers carried out the statutory duties of measuring imported goods for the purposes of calculating customs duties. *See* Tariff Act of 1789, ch. 2, § 1, 1 Stat. 24, 24-26 (repealed 1790); Act of Aug.

4, 1790, § 53, 1 Stat. 145, 172 (repealed 1799). Inspectors carried out the statutory duties of preventing ships from unloading goods without a permit and searching ships suspected of smuggling. *See* Act of Aug. 4, 1790, §§ 30-31, 1 Stat. at 164-65; *Officers*, *supra*, at 524 & n.178. Perhaps Congress did not initially provide for these positions by statute because their payment-for-service compensation structures mimicked aspects of non-officer government contracting positions, a category involving irregular government work existing at the time of the Founding just like today. *See* Act of Aug. 4, 1790, § 53, 1 Stat. at 172 (providing for payment in accordance with the amount of goods measured); *Officers*, *supra*, at 534-37. *But see* Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government* 1-48 (2013) (explaining that fees for services were a routine compensation mechanism for many governmental officials in the eighteenth century).

III. The Court should not distort the meaning of the Appointments Clause based on alleged practical implementation concerns.

In its decision here, the D.C. Circuit suggested that keeping ALJs from the reach of the Appointments Clause is a necessary protection to maintain independence in agency adjudicative proceedings. *See Lucia*, 832 F.3d at 288-89 (discussing "independence" through "tenure and compensation" and declining to "cast aside a carefully devised scheme" by concluding that ALJs are "officers"). But when considering the Appointments Clause in *Buckley*, this Court clearly instructed that practical fears such as the potential partiality of government decisionmakers "do not by themselves warrant a distortion of the Framers' work." *See* 424 U.S. at 134 (refusing to

reject constitutional appointment requirements based on the fear that presidential appointment would unduly influence federal election commissioners who administer presidential campaign rules).

In any event, the politically appointed SEC Commissioners have the last word on whether an ALJ's initial decision stands as the agency's final determination, or whether the Commissioners will instead review the decision. *See* 15 U.S.C. § 78d-1(b). *But see id.* (giving a party a right to Commission review in certain circumstances). When choosing to review, the SEC may consider the matter de novo. *See Lucia*, 832 F.3d at 286. Further, the SEC Commissioners have statutory authority to adjudicate matters in the first instance if they so choose. *See* 15 U.S.C. § 78d-1(a).

To be sure, an ALJ's initial determination, as a practical matter, often is the last word from the agency in adjudication. *See* 15 U.S.C. § 78d-1(c) (providing for ALJ decisions to be deemed "the action of the Commission" if there is no review). And when presiding over cases, ALJs have the power to take final action with respect to many matters that impact private rights like issuing subpoenas and ruling on offers of proof. *See* 17 C.F.R. § 200.14(a). But at the end of the day, whether ALJs meet a theoretical non-Article III standard of independence is immaterial in the sense that the politically appointed *Commissioners* have the final say over adjudication. If this Court believes that democratically accountable, constitutional appointment of adjudicative officials raises independence concerns, the Court should revisit the proper scope of matters that can be resolved by non-Article III adjudication in the first place. *See Stern v. Marshall*, 564 U.S. 462, 482-83 (2011); *see also* Mascott, *Constitutionally Conforming Agency Adjudication*, *supra*, at 42-51. The Court should not

compound any potential concerns over agency adjudicators lacking impartiality and improperly exercising judicial power with the additional error of insulating executive branch adjudicators from the Appointments Clause.

The Framers instituted the Appointments Clause as the mechanism to ensure excellence in government service and democratic accountability in the exercise of government power. *See Freytag*, 501 U.S. at 883-84. Permitting agency staff to hire ALJs enables department heads to distance themselves from public responsibility for adjudicative decisions issued from their agency. *Cf. Free Enterprise Fund*, 561 U.S. at 497-98 (tying public accountability to "a clear and effective chain of command"). Commissioners and department heads have the *power* to issue adjudicative decisions in line with their priorities. They should also bear the public *responsibility*—and, if necessary, the blame—for decisions issued by adjudicators appointed under their headship.

If this Court concludes consistent with Article II's original meaning that ALJs are "officers," aspects of the competitive-based selection of ALJs may remain permissible, at least in some form. *See Officers*, *supra*, at 550-56 (explaining potential constitutional concerns with aspects of the competitive service system as currently structured). Article II assigns Congress the power of establishing offices "by Law." U.S. Const. art. II, § 2, cl. 2. Since the Founding, that power to create offices has been interpreted to carry with it the authority to stipulate at least some credentials that must be held by the inferior officers filling those posts. *See, e.g.*, Volokh, *supra*, at 747; *Officers*, *supra*, at 551; *see also* Edward S. Corwin, *The President: Office and Powers, 1787-1948; History and Analysis of Practice and Opinion* 88-89 (3d ed. 1948).

These issues are multi-faceted and should be further briefed and vetted in an appropriate case. Here, a finding that the SEC's ALJs are "Officers of the United States" under the historical "statutory duty" standard—and thus, department head appointment is required—would answer the appointments-related aspect of the specific question presented to the Court.

CONCLUSION

For the reasons stated, this Court should reverse the D.C. Circuit's judgment.

Respectfully submitted,

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Amicus Curiae

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